Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1979.

No. 79-787

EDWARD F. KAVANAGH, HUSTON T. ADAMS and ROBERT M. ABERNETHY,

Appellants,

v.

LONDON GROVE TOWNSHIP, et al.,

Appellees.

Appeal From the Supreme Court of Pennsylvania
No. 482 January Term 1978.

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

Appellants hereby appeal from the final judgment of the Supreme Court of Pennsylvania entered on July 6, 1979, and from the denial of appellants' timely petition for reargument entered on August 22, 1979.[1] That final judgment sustained, by an equally divided court, the constitutionality under the Fourteenth Amendment to the United States Constitution of a township zoning ordinance which prohibited sanitary landfills operated by private enterprise, while allowing sanitary landfills to exist if operated by a municipality or a municipal authority. This Jurisdictional Statement demonstrates that this Court has jurisdiction over the substantial federal questions presented by this appeal.

OPINIONS BELOW.

The opinion of the Supreme Court of Pennsylvania affirming, by an equally divided court, the Order of the Commonwealth Court of Pennsylvania is officially reported at — Pa. —, 404 A. 2d 393 (1979), and is printed in the Appendix at pp. A2-A16.

The opinion of the Commonwealth Court of Pennsylvania affirming the Order of the Court of Common Pleas, Chester County, Pennsylvania, is officially reported at 33 Pa. Commw. Ct. 420, 382 A. 2d 148 (1978), and is printed in the Appendix at pp. A17-A21.

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1. In addition to London Grove Township, appellees herein include Daniel E. Blevins, Helen K. Blevins, Samuel L. Coates, Elkins Wetherill, Harriet Wetherill, Jess E. Bewley, Evelyn D. Bewley, Anna Barlow, Mary Helen Pierce, Julius J. Willa, Jr., John Speakman, Lillian Speakman and Booth Yarnall.

The opinion of the Court of Common Pleas, Chester County, Pennsylvania, affirming the decision of the London Grove Township Board of Supervisors is unreported and is printed in the Appendix at pp. A22-A26.

The decision of the London Grove Township Board of Supervisors denying Appellants' petition for a curative amendment challenging the constitutionality of the London Grove Township zoning ordinance is unreported and is printed in the Appendix at pp. A27-A35.

JURISDICTION.

The final judgment of the Supreme Court of Pennsylvania affirming, by an equally divided court, the denial of appellants' petition to amend the London Grove Township zoning ordinance, and sustaining the validity of that ordinance under the Fourteenth Amendment to the United States Constitution, was entered on July 6, 1979. (App. A2) Appellants' timely petition for reargument was denied by the Supreme Court of Pennsylvania by order entered on August 22, 1979. (App. A1) Appellants' Notice Of Appeal to this Court was filed in the Court of Common Pleas, Chester County, Pennsylvania, which has possession of the record in this case, on November 5, 1979. (App. A36-A37)

The jurisdiction of this Court is invoked under and pursuant to 28 U. S. C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Fourteenth Amendment to the Constitution of the United States.

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment to London Grove Township Zoning Ordinance of 1974.

"An Amendment to the London Grove Township Zoning Ordinance of 1974, as amended, to permit conditional use procedures when considering applications for the use of land as a sanitary landfill in the R-1 and R-2 Districts, and prohibiting landfill use in the R-3 District.

Be It enacted and ordained by the Board of Supervisors of the Township of London Grove that the London Grove Township Zoning Ordinance of 1974, as amended, be further amended in the following respects:

Section 1. Article IV, R-1 Residential District, Section 400 f. is amended to read as follows:

f. Municipal, county, state or federal uses, excluding correctional or penal institutions, except that sanitary landfills, when operated by a municipal authority or by a municipality, shall be permitted as a conditional use subject to the provisions of Article XIII-A, as provided hereinafter.

Section 2. Article V, R-2 Residential District, Section 500 f. is amended to read as follows:

1. Municipal, county, state or federal uses, excluding correctional or penal institutions, except that sanitary landfills, when operated by a municipal authority or by a municipality, shall be permitted as a conditional use subject to the provisions of Article XIII-A, as provided hereinafter.

Section 3. Article VI, R-3 Residential District, Section 600e. is amended to read as follows:

e. Municipal, county, state or federal uses, excluding correctional or penal institutions and sanitary landfills."

QUESTION PRESENTED.

Is a township zoning ordinance which permits municipalities and municipal authorities, but not private enterprise, to operate a sanitary landfill in the township invalid under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution where the ordinance: (a) does not have a substantial relation to the public health, safety, morals, or general welfare; (b) does not bear a rational relationship to any legitimate state interest; (c) is overbroad in light of the existence of less drastic means to effect its purpose; (d) facilitates excessive governmental control over proprietary business activities; and (e) prohibits private enterprise from engaging in a legitimate land use which is essential to the public health, safety, and general welfare?

STATEMENT OF THE CASE.

A. Factual Background of This Controversy.

One of the most critical problems currently confronting this country is the sanitary treatment and disposal of solid waste [2] materials.[3] Congress,[4] state legislatures, and

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2. Congress has defined the term solid waste in the Solid Waste Disposal Act, 42 U. S. C. § 6903(27) (1976), as follows:

> "The term 'solid waste' means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33, or source, special nuclear, or by-product material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923)."

3. "Refuse production is increasing at a rate faster than population growth because modern packaging, which is geared to an affluent society, has created a generation of throw-away containers and planned obsolescence. Disposal technology has not kept pace with the increasing volume of trash." Comment, *State Embargo of Solid Waste*, 82 DICK. L. REV. 325, 325 n. 3 (1978), *citing* 42 U. S. C. A. § 6901(a)(1), (b)(3) (West 1977); J. PAVONI, J. HEER & D. HAGERTY, *Handbook of Solid Waste Disposal* 2 (1975).

4. In enacting the Solid Waste Disposal Act, Congress expressly found:

> "(2) that the economic and population growth of our Nation, and the improvements in the standard of living enjoyed by our population . . . have resulted in a *rising tide of scrap, discarded, and waste materials;* (3) that the continuing concentration of our population in expanding metropolitan and other urban areas has presented these communities with serious financial, management, intergovernmental, and technical problems in the disposal of solid wastes resulting from the industrial, commercial, domestic, and other activities carried on in such areas; (4) that . . . the *problems of waste disposal* as set forth above *have become a matter national in scope and in concern* . . . ." 42 U. S. C. § 6901(a) (1977). (Emphasis added.)

state and federal courts have devoted considerable attention to this significant problem. In fact, this Court recently recognized the importance of the solid waste disposal problem when it ruled that a New Jersey statute which prohibited the importation of solid waste originating outside the territorial limits of the state was unconstitutional because it enabled New Jersey "to isolate itself in the stream of interstate commerce from a *problem shared by all.*" *City of Philadelphia v. New Jersey,* 437 U. S. 617, 629 (1978). (Emphasis added.)

The present case arises from an attempt by appellants Edward F. Kavanagh, Huston T. Adams and Robert M. Abernethy to alleviate this "problem shared by all"—the solid waste disposal problem—by operating a state-permitted and state-regulated sanitary landfill [5] in London Grove Township, Chester County, Pennsylvania—an area located approximately 40 miles west of Philadelphia. In 1975, appellants purchased 79.6 acres of land situate in the R-1 Zoning District of London Grove Township ("Township") for the purpose of operating a private sanitary landfill [6] which would be open to the public. This private sanitary landfill site, which was the best available site in the Township,[7] was designed to serve the area then

5. A "sanitary landfill" is an engineered and geologically coordinated system for storing and covering solid waste upon open areas of real property. (App. A28)

6. As used herein, the term "private sanitary landfill" refers to a sanitary landfill open to the public, but owned and operated by private enterprise.

7. The Township Board of Supervisors made, *inter alia,* the following finding of fact at the conclusion of the hearing on appellants' Petition For Curative Amendment:

> "27. The *Township Engineer,* who conducted a study of various sites within the Township for locating a landfill, *concluded that this site was the best available in the Township.*" (Emphasis added.) (App. A30)

being served by the Southeastern Chester County Refuse Authority landfill, which was expected to, and did, close in 1977.[8]

Significantly, appellants' decision to operate a private sanitary landfill on their property was influenced by the fact that the Chester County Solid Waste Management Plan [9]—a plan adopted and approved by, *inter alia,* Chester County, the Department of Environmental Resources of the Commonwealth of Pennsylvania ("DER"), and London Grove Township—expressly called for the establishment of a sanitary landfill, *preferably by private enterprise,* in the precise locale where appellants' property was situated. This comprehensive Plan also characterized the landfill method proposed by appellants as "environmentally

8. The Southeastern Chester County Refuse Authority ("Authority") closed its landfill site during the course of the legal proceedings herein. Subsequent applications by the Authority to operate a landfill in London Grove Township have been rejected by the Township. As a result, southeastern Chester County completely lacks any state-approved method for disposal of its solid waste.

9. The Chester County Solid Waste Management Plan, which was submitted as evidence at the hearing before the Township Board of Supervisors, was enacted in accordance with Section 5 of the Pennsylvania Solid Waste Management Act, 35 P. S. § 6005 (1977), which requires, in part, that:

> "(d) Every plan shall:
>
> (1) Provide for the orderly extension of solid waste management systems in a manner consistent with the needs and plans of the whole area, and in a manner which will not create pollution of the waters or air of the Commonwealth, nor constitute a public nuisance and shall otherwise provide for the safe and sanitary disposal of solid waste; (2) Take into consideration all aspects of planning, zoning, population estimates, engineering and economics so as to delineate with all practicable precision those portions of the area which may reasonably be expected to be served by a solid waste management system within the next ten years as well as those areas where it is not reasonably foreseeable that a solid waste management system will be needed after ten years. . . ."

compatible" and specifically recommended its use in southeastern Chester County "as the most feasible disposal method for the region from now until the turn of the century." Moreover, this Plan's preference for the involvement of private enterprise in the solid waste disposal field was in accord with the Commonwealth of Pennsylvania's declared policy to "[*u*]*tilize*, wherever feasible and desirable, the *capabilities of private enterprise* in accomplishing the desired objectives of an effective solid waste management program." [10] (Emphasis added.)

Thus, recognizing the need for, and appropriateness of, a private sanitary landfill operation on their property, appellants applied for and obtained a solid waste management permit from the Commonwealth of Pennsylvania, pursuant to the provisions of the Pennsylvania Solid Waste Management Act ("Act").[11] (— Pa. at —, 404 A. 2d at 394; App. A7) In obtaining this permit, appellants submitted to the Commonwealth extensive geological and engineering modules which demonstrated that they could operate a private sanitary landfill in conformance with the state's comprehensive health and safety standards.[12]

However, appellants' attempt to operate this legitimate and essential business of solid waste disposal by a private sanitary landfill has been frustrated by the Township's invidious and constitutionally defective zoning ordinance which bars private enterprise from operating solid

10. Pa. Stat. Ann. tit. 35, § 6002(2) (Purdon 1977). (Emphasis added.)

11. Pa. Stat. Ann. tit. 35, §§ 6001-6017 (Purdon 1977).

12. The Solid Waste Management Act's implementing regulations contain strict requirements concerning, *inter alia*, daily cover of a sanitary landfill, litter control, control of potential water and air pollution, and bonding of the operator to protect the environment in the event of financial insolvency. 25 Pa. Code §§ 75.1-75.38 (1979).

waste disposal facilities within its boundaries.[13] Significantly, the Township's constitutionally impermissible denial of appellants' right to conduct this state-permitted and state-regulated business on their property directly contravenes the aforedescribed state and county land use policies encouraging the use of private enterprise in the solid waste disposal field. In addition, the Township's discriminatory ordinance lacks any factual foundation for excluding private enterprise from the solid waste disposal field [14] and it represents precisely the type of myopically provincial legislative response to a "problem shared by all" which this Court struck down as unconstitutional in *City of Philadelphia v. New Jersey, supra.*

B. History of This Controversy.

In January 1976, appellants filed with London Grove Township a Petition for Curative Amendment [15] challenging the constitutionality of the township zoning ordinance. Appellants sought by their Petition to amend the ordinance to permit private enterprise to operate sanitary landfills in the R-1 District.

13. The ordinance prohibits the operation of landfills by private enterprise in the R-1 District and in all other districts of the Township, while, at the same time, allowing a municipality or municipal authority to operate a landfill in the R-1 District.

14. Justice Larsen of the Supreme Court of Pennsylvania declared in his Opinion In Support of Reversal that:

> "*There is no factual basis for this assertion—a landfill is a landfill.* Problems arise without regard for the form of ownership of the operation. The testimony given at the hearing by DER officials indicates that municipalities suffer from noncompliance as often as do private companies—'public pressure', it appears, is no talisman warding off the evils of landfills." (— Pa. —, 404 A. 2d at 396; App. A11) (Emphasis added.) (Footnote omitted.)

15. The petition for curative amendment is a Pennsylvania statutory procedure by which a landowner can challenge the validity of a zoning ordinance and obtain definitive relief therefrom. See Pa. Stat. Ann. tit. 53, §§ 10609.1, 11004, 11011 (Purdon 1977).

At hearings held before the London Grove Township Board of Supervisors in early 1976, appellants' witnesses, who included an expert on solid waste management, the Regional Director of the Pennsylvania Department of Environmental Resources, and the township's own engineer, presented extensive testimony demonstrating that no substantial distinguishing characteristics existed between municipally operated and privately operated sanitary landfills with respect to planning, operation, management, and compliance with applicable health and safety regulations.

On June 7, 1976, the Board of Supervisors rendered a written decision denying appellants' Petition for Curative Amendment. (App. A27-A35) Significantly, the Board of Supervisors reached this result despite its adoption of, *inter alia*, the following findings of fact which confirm the absence of any substantial distinguishing characteristics between privately operated and municipally operated sanitary landfills:

> "1. An Applicant seeking to establish a landfill in the Commonwealth of Pennsylvania must submit to comprehensive procedures established by the Department of Environmental Resources (DER). . . .
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> 5. The DER has a fund available to use if an operator withdraws or goes bankrupt.
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> 6. . . . DER does have regulations regarding the types of trucks to be used.
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> 7. The DER can require bonding of private applicants in some situations. . . .
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> 18. The DER regulations apply equally to public and private landfills.
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> 20. A Municipal authority has no guarantee of financial solvency. . . ."

Appellants appealed the adverse decision of the Board of Supervisors to the Court of Common Pleas of Chester County. Shortly thereafter, certain landowners within the township who opposed the appeal were permitted to intervene in the proceedings. By Decision and Order filed on March 2, 1977, the Honorable John M. Wajert affirmed the decision of the Board of Supervisors. (App. A22-A26) Appellants thereafter filed an appeal to the Commonwealth Court of Pennsylvania, which entered an Order on February 1, 1978, affirming the Order of the Court of Common Pleas. (33 Pa. Commw. Ct. 420, 382 A. 2d 148; App. A17-A21) Subsequently, appellants appealed to the Supreme Court of Pennsylvania, which on July 6, 1979, entered a judgment affirming, by an equally divided court, the Order of the Commonwealth Court of Pennsylvania. (App. A2) Separate opinions, authored by Justice Larsen and Justice Roberts, respectively, were handed down in support of reversal and affirmance of the order below. (— Pa. —, 404 A. 2d 393; App. A3-A16) On August 22, 1979, the Supreme Court of Pennsylvania denied appellants' timely petition for reargument (App. A1), and this appeal followed.

C. Raising the Federal Questions.

At each stage of the proceedings below, appellants properly raised the substantial federal claim that the London Grove Township zoning ordinance was invalid under the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution. Thus, in their Petition for Curative Amendment filed with the township, appellants contended that the ordi-

nance was "invalid, unlawful, and unconstitutional" because the distinction therein between municipally operated and privately operated landfills bore "no adequate relationship to the health, safety, morals and general welfare of the township" and unlawfully discriminated against private operators of sanitary landfills. In denying appellants' petition, the Board of Supervisors specifically concluded that the ordinance was "valid and constitutional" and that it did "not improperly exclude or discriminate against privately-operated landfills." (App. A35)

Appellants renewed their constitutional claims before the Court of Common Pleas. That court, however, affirmed the decision of the Board of Supervisors and held that "the existing regulation cannot be said to be unconstitutionally discriminatory, arbitrary, capricious or unreasonable, nor can it be found to be an abuse of legislative discretion." (App. A25) In affirming the order of the Court of Common Pleas, the Commonwealth Court considered and expressly rejected "appellants' contention that . . . [the ordinance] is arbitrary and discriminatory, and thereby unconstitutional." (App. A19)

The Supreme Court of Pennsylvania was evenly divided on the merits of appellants' constitutional challenge. Thus, while three justices, in an opinion by Justice Roberts, summarily concluded that the "ordinance meets the requirements of due process" and was not "unconstitutionally arbitrary", the remaining justices, in an opinion by Justice Larsen, held squarely that the ordinance was an unconstitutional exercise of police power under *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926), and an unlawful interference with the rights guaranteed appellants by the Fourteenth Amendment. (— Pa. —, 404 A. 2d 393-98; App. A3-A16)

THE QUESTIONS ARE SUBSTANTIAL.

The London Grove Township Zoning Ordinance Is Repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

For more than half a century, this Court has consistently adhered to the principle first announced in *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 395 (1926), that a zoning ordinance will be declared unconstitutional under the due process clause of the Fourteenth Amendment where its provisions "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[16] As this Court explained in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 121 (1928):

> "Zoning measures must find their justification in the police power exerted in the interest of the public . . . . 'The governmental power to interfere by zoning regulations with the general rights of the landowner by restricting the character of his use, is not unlimited and . . . such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare . . . .' *Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities.*" (Emphasis added.)

16. *See Moore v. City of East Cleveland*, 431 U. S. 494, 498 (1977); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 263 (1977); *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U. S. 668, 676 (1976); *Village of Belle Terre v. Boras*, 416 U. S. 1, 3 (1974); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 121 (1928); *Nectow v. City of Cambridge*, 277 U. S. 183, 188 (1928).

Similarly, to withstand constitutional challenge under the equal protection clause of the Fourteenth Amendment, legislation which discriminates against a particular class must, at a minimum, bear a "rational relationship" to a legitimate governmental purpose, and it will be struck down if the discriminatory classification rests on grounds wholly irrelevant or unrelated to the achievement of that legitimate governmental purpose. *Friedman v. Rogers*, — U. S. —, 59 L. Ed. 2d 100, 115 (1979); *Holt Civic Club v. City of Tuscaloosa*, — U. S. —, 58 L. Ed. 2d 292, 302 (1978).

Thus, the questions which must be resolved by this Court in the present case are whether the London Grove Township zoning ordinance has a substantial relation to the public health, safety, and general welfare, and whether the ordinance is rationally related to a legitimate governmental interest. It is submitted that on the facts of this case, these questions must be answered in the negative.

A. The Distinction Drawn in the Ordinance Between Municipally Operated and Privately Operated Sanitary Landfills Is Arbitrary and Irrational, and Its Alleged Relation to the Public Health, Safety and General Welfare Is Not Supported by the Record in This Case or by Applicable Decisions of This Court and Other Courts.

As Justice Larsen accurately perceived in his opinion in support of reversal, the record in this case [17] clearly

17. Finding it "evident . . . that sanitary landfill operations affect the health and safety of a community," Justice Roberts of the Supreme Court of Pennsylvania *summarily* sustained the township zoning ordinance on the ground that it reasonably reflected the township's alleged concerns for "public health" and for the "continued operational stability" of its sanitary landfill operations. (— Pa. at —, 404 A. 2d at 397; App. A15) Thus, Justice Roberts *failed even to question the unfounded assertions of appellees below* that municipalities and municipal authorities, as public entities,

demonstrates that the distinction drawn in the ordinance between municipally operated and privately operated sanitary landfills is an irrational and "artificial one" which bears no relation whatsoever to the health, safety, or general welfare of the community or to any legitimate governmental purpose:

> "First, appellee and intervenors assert that permitting landfills to be operated only by municipalities will result in greater control over problem areas not covered by DER regulations (e.g. blowing litter control at landfill site) as well as more effective enforcement of DER regulations. Municipalities, the argument goes, are more responsive to 'public pressure' than private enterprises and thus will be more inclined to comply with DER standards and procedures and to respond to concerns of the residents of the community. *There is no factual basis for this assertion—a landfill is a landfill.* Problems arise without regard for the form of ownership of the operation. The testimony given at the hearing by DER officials indicates that municipalities suffer from non-compliance as often as do private companies—'public pressure', it appears, is no talisman warding off the evils of landfills. If anything, the record suggests that DER may be more inclined to be lenient with municipal operations than with private. Further, the preference expressed in the Solid Waste Management Act for private operations contradicts the assumption that municipalities are better able to achieve compliance with DER regulations than are private entrepreneurs.
>
> ° ° °

17. (Cont'd.)
are more inclined than private enterprise to comply with applicable landfill regulations and are less likely to become financially insolvent.

It is also asserted that a municipality has no assurances of the financial solvency of a private operator of a landfill and that the danger of the operator's potential bankruptcy can be solved by permitting municipal operators only. *Again there is no support in the record for this assertion.* A DER official testified that in his many years of experience he had never experienced or heard of a private sanitary landfill becoming insolvent, but that he had experienced situations where municipal authorities had used financial difficulties as an excuse for their failure to comply with DER regulations." (— Pa. at —, 404 A.2d at 396-97; App. A11-A13) (Emphasis added.) (Footnote omitted.)

Justice Larsen's conclusions were soundly based on the findings of fact adopted by the London Grove Township Board of Supervisors, which totally obviate any contention that a reasonable basis exists for denying to private enterprise the land use rights which are freely accorded by the ordinance to municipalities and municipal authorities. Thus, the Board of Supervisors found, *inter alia*:

> "1. An Applicant seeking to establish a landfill in the Commonwealth of Pennsylvania must submit to comprehensive procedures established by the Department of Environmental Resources (DER) . . . .
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> * * *
>
> 5. The DER has a fund available to use if an operator withdraws or goes bankrupt.
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> 6. . . . DER does have regulations regarding the types of trucks to be used.
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> * * *
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> 7. The DER can require bonding of private applicants in some situations . . . .
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> * * *

> 8. The DER will advise applicants to comply with local regulations . . . . Local regulations can be more stringent than those imposed by DER. . . .
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> * * *
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> 18. The DER regulations apply equally to public and private landfills.
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>
> 20. A Municipal authority has no guarantee of financial solvency . . . ." (App. A27-A29)

In analogous situations, this Court has resoundingly refuted the same "public service" argument advanced by appellees below and rejected by Justice Larsen. Thus, in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389 (1978), this Court characterized as "without merit" the argument that "because government is subject to political control, the welfare of its citizens is assured through the political process. . . ." *Id.* at 406. In addition, the opinion in *City of Lafayette* conclusively put to rest the unfounded assumption that the motivations of municipalities or municipal authorities differ significantly from those of private enterprise:

> "Petitioners' contention that their goal is not private profit but public service is only partly correct. Every business enterprise, public or private, operates its business in furtherance of its own goals. In the case of a municipally owned utility, that goal is likely to be, broadly speaking, the benefit of its citizens. But the economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corpora-

tions acting in furtherance of the interests of the organization and its shareholders." *Id.* at 403.

Moreover, the cases are legion that zoning distinctions based upon ownership, as is the present ordinance, are constitutionally defective. Thus, several state supreme courts have held that a zoning ordinance which permits public schools in a particular district, while prohibiting private schools in the same district, violates the due process and equal protection guarantees of the Fourteenth Amendment.[18] For example, in *State v. Northwestern Preparatory School*, 228 Minn. 363, 365, 37 N. W. 2d 370, 371 (1949), the court struck down a city ordinance which permitted public schools in a residential district, but prohibited private schools in the same district, stating as follows:

> "The Fourteenth Amendment guarantees due process and equal protection as separate rights. . . . The guarantee of equal protection of the laws requires equality of application of the laws—that all similarly circumstanced shall be treated alike. . . . The provisions of the zoning ordinance here involved do not apply equally to public, parochial, and privately owned schools. So far as the purposes of the ordinance are concerned, there is no difference between public and parochial schools on the one hand and private schools on the other. While ownership, some of the subjects taught, and the discipline enforced may be different in each from what they are in the others,

18. *See, e.g., Phillips v. City of Homewood*, 255 Ala. 180, 50 So. 2d 267 (1951); *Roman Catholic Welfare Corp. v. City of Piedmont*, 45 Cal. Rptr. 2d 325, 289 P. 2d 438 (1955); *City of Miami Beach v. State ex rel. Lear*, 128 Fla. 750, 175 So. 537 (1937); *City of Chicago v. Sachs*, 1 Ill. 2d 342, 115 N. E. 2d 762 (1953); *State v. Northwestern Preparatory School*, 228 Minn. 363, 37 N. W. 2d 370 (1949); *Lumpkin v. Township Committee*, 134 N. J. L. 428, 48 A. 2d 798 (1946); *Diocese of Rochester v. Planning Board*, 1 N. Y. 2d 508, 136 N. E. 2d 827 (1956).

> a private school has no effect upon a residential area different from that of a public or parochial one. The distinction between the different kinds of schools, upon which the classification made in the ordinance rests, is not based upon alleged evils which it is claimed exist in the case of private schools and do not exist in the case of public or parochial schools. *The distinction is based solely upon ownership. Such a distinction bears no relation to the purposes of the ordinance, and for that reason is arbitrary. The ordinance denies to private schools the rights which it accords to public and parochial schools under the same circumstances. Thereby the ordinance fails to accord to private schools the equal protection of the laws. In that particular it is unconstitutional as denying to private schools the equal protection of the laws.*" (Emphasis added.)

Thus, under this Court's controlling standards, it is clear, and three justices of the Supreme Court of Pennsylvania so held, that the London Grove Township zoning ordinance, which permits municipalities and municipal authorities, but not private enterprise, to operate sanitary landfills in the township, unlawfully interferes with the inalienable rights guaranteed appellants by the Fourteenth Amendment, and impermissibly prohibits private enterprise from engaging in a legitimate land use which is *essential* to the health, safety, and general welfare of the community.

B. Any Legitimate Concerns of the Township Can Be Protected by Alternative Means That Do Not Infringe Appellants' Constitutional Rights.

As this Court has repeatedly held, legislation which purports to further a legitimate governmental interest must

be carefully tailored to achieve its goals in a manner which does not unnecessarily restrain or burden constitutionally protected activity. *Illinois State Board of Elections v. Socialist Workers Party*, — U. S. —, 59 L. Ed. 2d 230, 241 (1979); *Vlandis v. Kline*, 412 U. S. 441, 451 (1973); *Dunn v. Blumstein*, 405 U. S. 330, 343 (1972). Thus, in testing the constitutionality of a restriction imposed by a zoning ordinance, it is necessary to consider whether the detriment sought to be avoided by the ordinance can be dealt with by alternative methods requiring significantly less curtailment of a property owner's right to use his land. *Exton Quarries, Inc. v. Zoning Board of Adjustment*, 425 Pa. 43, 62 n. 22, 228 A. 2d 169, 180 n. 22 (1967); *Eller v. Board of Adjustment*, 414 Pa. 1, 8, 198 A. 2d 863, 866 (1964).

Such an analysis is particularly warranted in the present case, since appellants were issued a permit by the Pennsylvania Department of Environmental Resources authorizing them to operate a landfill on their property and have therefore satisfied that agency's rigorous health, safety and environmental standards which must be met before such a permit will be granted. DER also monitors and enforces the operator's compliance with its comprehensive regulations during the actual operation of the landfill.

Incredibly, Justice Roberts made no effort to determine whether, in light of the considerable protection afforded the public by this comprehensive regulatory scheme, the alleged goals of the ordinance could be realized without totally denying private enterprise the right to operate sanitary landfills in the township. Justice Larsen, however, found it obvious that even if the township were justified in its concerns for public health and for the financial solvency of private landfill operators, the township's "blanket prohibition of privately operated landfills sweeps too far":

> "*The existence of available alternatives that are less obnoxious to constitutionally protected rights renders that prohibition unnecessary and unreasonable. . . .* In this case, the Board of Supervisors found that appellants were willing to accept reasonable controls by the township. Further, the township could, under the authority of the Second Class Township Code, enact reasonable and specific ordinances to deal with specific problems which ordinances would go no further than necessary to correct the particular problem so long as the regulation was not inconsistent with DER regulations, standards and procedures. 35 P. S. § 6010. For example, the problem of blowing litter could be met by requiring the erection of snow fencing and/or daily policing of the area.
>
> ° ° °
>
> "And, once again, *there are less drastic means available to the township to protect against financial insolvency* since the Board found that DER had a fund available to use if an operator withdraws or goes bankrupt." (— Pa. at —, 404 A. 2d at 397; App. A12-A13) (Emphasis added.)

In *General Battery Corp. v. Zoning Hearing Board*, 29 Pa. Commw. Ct. 498, 371 A. 2d 1030 (1977), a corporation which generated waste as an incident of its lead-smelting operations was denied a permit to construct waste disposal facilities on land it owned in the township after the zoning hearing board upheld a township zoning ordinance which made no provision for industrial uses anywhere in the township. Holding the ordinance invalid, the Commonwealth Court of Pennsylvania emphasized:

> "Under the authority of the Pennsylvania Solid Waste Management Act, the Pennsylvania Department of

> Environmental Resources is given broad power to regulate waste disposal systems. In addition, the Department is authorized to use a wide variety of methods to protect and preserve the quality of our water. *Under these circumstances, we conclude that waste disposal facilities do not have the obvious potential for polluting air or water or otherwise creating uncontrollable health or safety hazards. Nor do common knowledge and experience suggest other clearly deleterious effects which would inevitably be visited upon the public in general. . . .* We conclude that whether a possibility exists that General Battery's activity might have detrimental effects does not justify a total exclusion of all industrial waste disposal facilities." 29 Pa. Commw. at 502-03, 371 A. 2d at 1032. (Emphasis added.) (Footnotes omitted.)

Similarly, in *Eller v. Board of Adjustment,* 414 Pa. 1, 198 A. 2d 863 (1964), the Supreme Court of Pennsylvania held unconstitutional a township ordinance which permitted mushroom houses to be located in a residential district provided they were situated at least 500 feet from the nearest official roadside line and 1000 feet from all other lot boundaries. The court stated:

> "We can find in this record no reasonable basis on which to restrict a mushroom house to property of the large dimensions required by the ordinance. There is some testimony which intimates that mushroom farms may, in some instances, give off unpleasant odors or present sanitation problems. Indeed, appellant's brief states, 'The mushroom industry is one with special problems which require special regulations.' *If this be so, let those special regulations be enacted on a reasonable basis rather than as a blanket prohibition.*" 414 Pa. at 8, 198 A. 2d at 866. (Emphasis added.)

In the present case, London Grove Township has confused reasonable regulation of private sanitary landfills with total prohibition of that use by private enterprise. Even if the township had legitimate concerns which justified its distinction between municipally operated and privately operated landfills, such concerns could easily be alleviated, in a manner consistent with appellants' fundamental constitutional rights, by reasonable regulation rather than outright and total exclusion.

C. The Ordinance Facilitates Excessive Governmental Control Over Proprietary Business Activities and Prohibits Private Enterprise From Engaging in a Legitimate Land Use Which Is Essential to the Health, Safety and General Welfare of the Community.

The basic function of zoning is land use regulation and the regulation and classification of structures within certain areas of the community. It is not a proper zoning function to regulate or limit the class of persons who may use the land for a purpose which the legislative body has already determined to be proper and legitimate; *i.e.*, it is improper for zoning boards to classify land users rather than land uses.

In *Washington ex rel. Seattle Title Trust Co. v. Roberge,* 278 U. S. 116 (1928), a city zoning ordinance provided that "[a] philanthropic home for children or for old people shall be permitted in first residence district when the written consent shall have been obtained of the owners of two thirds of the property within four hundred (400) feet of the proposed building." The trustee was denied a permit to erect a philanthropic home in the district because

it did not obtain the consent of other landowners in accordance with the terms of the ordinance. In holding the ordinance unconstitutional under the Fourteenth Amendment, this Court emphasized:

> "The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution. . . . And *there is no legislative determination that the proposed building and use would be inconsistent with public health, safety, morals or general welfare. The enactment itself plainly implies the contrary. The grant of permission for such building and use, although purporting to be subject to such consents, shows that the legislative body found that the construction and maintenance of the new home was in harmony with the public interest and with the general scope and plan of the zoning ordinance.*" *Id.* at 121. (Emphasis added.)

Here, London Grove Township, like the City of Seattle, has permitted sanitary landfills to be located in the R-1 Residential District, and this legislative determination demonstrates that the operation of a sanitary landfill in that district is harmonious with the general health, safety, and welfare of the community. London Grove, however, has gone one step further, and has told appellants not how, where, or in what circumstances they may use their property, but rather that they cannot use it at all for an otherwise legitimate purpose merely because they are private enterprise.

Because this discriminatory classification has no basis in fact or in reason, and does not further any legitimate goal, the township has clearly exceeded the constitutional limits of its police and zoning powers. Indeed, as Justice Larsen cautioned, the township ordinance facilitates excessive governmental control over, and interference with, proprietary business activities which have traditionally been the province of private enterprise:

> "I know of no directly applicable decisions of this Court wherein a zoning ordinance was challenged because a use was permitted if executed by a municipality while prohibited if executed by a private enterprise. *If government were to begin to enact laws which permitted certain entrepreneurial uses but only if the enterprise were conducted by government, it seems certain that in due course the role of government as entrepreneur would be increased to the detriment of private enterprise.* It seems clear, therefore, that a zoning ordinance which permitted the operation of a gasoline station, for example, but only if run by government, would be held to be invalid. On the other hand, it is manifest that a zoning ordinance which permitted the operation of a jail, but only if run by the government, would be constitutional. *There is, therefore, a line to be drawn between land uses which the government can permit to itself but forbid to private enterprise.*" (—Pa. at —, 404 A. 2d at 396; App. A10-A11) (Emphasis added.)

There can be no question in this case that the township zoning ordinance falls on the impermissible and unconstitutional side of the line drawn by Justice Larsen. The ordinance denies appellants, as private entrepreneurs, the right it grants to others to conduct a legitimate, state-regulated business on their property. This denial is especially pernicious because both the Commonwealth of Pennsylvania and the county in which appellants' land is located have legislatively determined that the operation of sanitary landfills is essential to the health, safety and gen-

eral welfare of the populace and have actively encouraged private enterprise to operate such landfills wher ver feasible.[19]

Indeed, the critical importance of implementing approved methods of solid waste disposal has been underscored by the recent decisions of this Court and other courts holding that local governmental bodies must accept their fair share of responsibilities in confronting the current waste disposal crisis. Thus, in *City of Philadelphia v. New Jersey*, 437 U. S. 617 (1978), this Court declared unconstitutional a New Jersey statute which prohibited the importation of solid waste originating outside the territorial limits of the state, stating as follows:

> "Today, cities in Pennsylvania and New York find it expedient or necessary to send their waste into New Jersey for disposal, and New Jersey claims the right to close its borders to such traffic. Tomorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders. *The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.*" *Id.* at 629. (Emphasis added.)

Accord, Hardage v. Atkins, 582 F. 2d 1264 (10th Cir. 1978) (holding unconstitutional an Oklahoma statute forbidding receipt and disposal of controlled industrial waste from outside the state unless the state of origin had enacted substantially similar standards for controlled industrial waste disposal).

19. See discussion at pp. 7-8 *supra*.

The clear mandate of *City of Philadelphia* and these other decisions has been blatantly ignored by London Grove Township, which has totally prohibited private enterprise from engaging in a legitimate and necessary land use which greatly benefits the public at large. Appellants herein have properly proceeded in accordance with state and county regulations and waste disposal policies,[20] and they must not be prevented from providing an essential service to the community by the parochial legislation of a township which has attempted to isolate itself "from a problem shared by all." *City of Philadelphia v. New Jersey, supra*, 437 U. S. at 629. By any yardstick, the London Grove Township zoning ordinance unjustifiably interferes with the rights guaranteed appellants by the Fourteenth Amendment and must not be permitted to survive the constitutional scrutiny of this Court.

20. See discussion at pp. 6-8 *supra*.

CONCLUSION.

For these reasons, this Court should note probable jurisdiction of this appeal and schedule oral argument.

Respectfully submitted,

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and

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213 East State Street,
Kennett Square, PA 19348

Filed November 20, 1979.

CERTIFICATE OF SERVICE.

I hereby certify that on this 20th day of November, 1979, three copies of this Jurisdictional Statement were served, by first class mail, postage prepaid, on the following attorneys:

Lawrence E. Wood, Esquire
126 West Miner Street
West Chester, Pennsylvania 19380

Robert W. Lentz, Esquire
30 Darby Road
Paoli, Pennsylvania 19301

I further certify that all parties required to be served have been served.

/s/ JOHN F. STOVIAK,
John F. Stoviak,
2600 The Fidelity Building,
Philadelphia, Pennsylvania 19109
Attorney for Appellants.

Appendix.

ORDER OF THE SUPREME COURT OF PENNSYLVANIA DENYING PETITION FOR REARGUMENT.

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

August 28, 1979

George A. Brutscher, Esquire
213 East State Street
Kennett Square, PA 19348

Re: Edward F. Kavanagh, et al., Appellants, v.
London Grove Township, et al.
No. 482 January Term, 1978

Dear Mr. Brutscher:

This is to advise you that the Petition for Reargument filed in the above-captioned appeal was denied by the Court on August 22, 1979.

Very truly yours,

SALLY MRVOS
Prothonotary

By /s/ CATHERINE E. LYDEN
Deputy Prothonotary

CEL/fm

cc: Lawrence E. Wood, Esquire
Robert W. Lentz, Esquire
West Publishing Company

JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 482 January Term, 1978

Commonwealth Court No. 495 C. D. 1977

EDWARD F. KAVANAGH, HUSTON T. ADAMS and ROBERT M. ABERNETHY

Appellants

v.

LONDON GROVE TOWNSHIP, etc., et al.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the ORDER of the COMMONWEALTH COURT OF PENNSYLVANIA, be, and the same is hereby AFFIRMED BY AN EQUALLY DIVIDED COURT.

By THE COURT:

SALLY MRVOS
Sally Mrvos, Esquire
Prothonotary

Dated: July 6, 1979

OPINION OF THE SUPREME COURT OF PENNSYLVANIA

[J-188]

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 482 January Term, 1978

Appeal from the Order dated February 1, 1978 of the Commonwealth Court of Pennsylvania (No. 495 C. D. 1977) Affirming the Order of the Court of Common Pleas of Chester County at No. 137 June Term, 1976, Zoning Appeal.

EDWARD F. KAVANAGH, HUSTON T. ADAMS and ROBERT M. ABERNETHY,

Appellants

v.

LONDON GROVE TOWNSHIP

and

DANIEL E. BLEVINS, HELEN K. BLEVINS, SAMUEL L. COATES, ELKINS WETHERILL, HARRIET WETHERILL, JESS E. BEWLEY, EVELYN D. BEWLEY, ANNA BARLOW, MARY HELEN PIERCE, JULIUS J. WILLA, JR., JOHN SPEAKMAN, LILLIAN SPEAKMAN, and BOOTH YARNALL,

Intervenors

OPINION

PER CURIAM: Filed: July 6, 1979

The Court being equally divided, the order is affirmed.

Mr. Justice Roberts filed an Opinion in Support of Affirmance in which Mr. Justice O'Brien and Mr. Justice Nix join.

Mr. Justice Larsen filed an opinion in Support of Reversal in which Mr. Justice Manderino joins.

Mr. Chief Justice Eagen would reverse and remand for further proceedings.

OPINION OF THE SUPREME COURT OF PENNSYLVANIA IN SUPPORT OF REVERSAL

[J-188]

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 482 January Term, 1978

Appeal from Order dated February 1, 1978 of the Commonwealth Court of Pennsylvania (No. 594 C. D. 1977) Affirming the Order of the Court of Common Pleas of Chester County at No. 137 June Term, 1976, Zoning Appeal

EDWARD F. KAVANAGH, HUSTON T. ADAMS and ROBERT M. ABERNETHY,
Appellants

v.

LONDON GROVE TOWNSHIP,
Appellee

and

DANIEL E. BLEVINS, HELEN K. BLEVINS, SAMUEL L. COATES, ELKINS WETHERILL, HARRIET WETHERILL, JESS E. BEWLEY, EVELYN D. BEWLEY, ANNA BARLOW, MARY HELEN PIERCE, JULIUS J. WILLA, JR., JOHN SPEAKMAN, LILLIAN SPEAKMAN, and BOOTH YARNALL,
Intervenors

OPINION IN SUPPORT OF REVERSAL

JUSTICE ROLF LARSEN Filed: July 6, 1979

Appellants are owners of a tract of land situated in an "R-1" residential zone of London Grove Township, appellee, in Chester County. The relevant zoning ordinance of the township provides that operation of a sanitary landfill is a permitted use within an R-1 zone but only if the operator is a municipality or a municipal authority. In January of 1976, appellants filed a petition for a curative amendment to the ordinance which amendment would provide that operation of a sanitary landfill was a permitted use regardless of whether the operator was a municipality, a municipal authority or a private enterprise.

Following hearing, the London Grove Township Board of Supervisors (the Board) denied the application and the Court of Common Pleas of Chester County affirmed without taking additional testimony. On further appeal, the Commonwealth Court unanimously affirmed. *Kavanagh v. London Grove Township,* — Pa. Cmwth. —, 382 A. 2d 148 (1977). This Court granted appellants' petition for allowance of appeal on November 9, 1978.

I. SOLID WASTE MANAGEMENT ACT

Appellant argues that the Pennsylvania Solid Waste Management Act, 35 P. S. §§ 6001-6017 (1977) (hereinafter the Act) has effected a limited pre-emption in the field of sanitary landfills and that, therefore, municipalities such as appellee township are precluded from adopting any regulations regarding such landfill operations. I disagree. Section 6002 declares the purpose of the Act to:

> (1) Establish and maintain a cooperative state and local program of planning and technical and financial assistance for comprehensive solid waste management;

> (2) *Utilize, wherever feasible and desirable, the capabilities of private enterprise* in accomplishing the desired objectives of an effective solid waste management program; and
>
> (3) Require permits for the operation of processing and disposal systems.

The Act further provides that the Pennsylvania Department of Environmental Resources (DER) shall administer the Act, and shall establish policies and adopt regulations to effectuate the purposes and provisions of the Act. *Id.* at § 6006. Additionally, section 7 of the Act, 35 P. S. § 6007, sets forth a detailed permit procedure applicable to every person, municipality, county or authority which requires applicants desirous of using their land as a disposal area for a solid waste management system to first obtain a permit from DER.[1] While the Act does express a preference for the utilization of private enterprise, it does not purport to preclude municipalities from promulgating zoning ordinances and regulations in the area of sanitary landfill management, nor am I persuaded to construe the Act as implicitly containing such a preclusion.

The Second Class Township Code, 53 P. S. § 65708, *as amended* (Supp. 1978-79) (hereinafter the Code) provides, in relevant part, that the supervisors of second class townships (such as appellee) shall have power to:

> *[R]egulate* or prohibit the dumping or otherwise depositing of ashes, garbage, rubbish and other refuse materials within the township. . . . They shall also have power to—

1. I note that a permit for operation of a solid waste disposal system on the property in question was issued on September 9, 1977 to appellants (doing business as AAK Sanitary Landfill, F. P. Kavanagh & Son, Inc.) well after the date of the hearing before the Board.

> (1) Collect, remove and dispose of or to provide, by contract or otherwise, for the collection, removal and disposal, by incineration, *land fill* or other methods of ashes, garbage, rubbish and other refuse materials and to prescribe penalties for the enforcement thereof. . . . To acquire any real property and to erect, maintain, improve, operate, and lease, either as lessor or lessee, facilities for incineration, *land fill* or other methods of disposal . . .

Thus, regulation of landfill systems is specifically provided in the Code. It is our duty to reconcile the two legislative enactments and, if possible, to give effect to all of the provisions of each. Statutory Construction Act of 1972, 1 P. C. S. § 1921(a), § 1932 (Supp. 1978-79). In this case, reconciliation so as to give full effect to both the Act and the Code is not difficult. A second class township has the power to adopt reasonable regulations and zoning ordinances regarding sanitary landfills so long as the regulations/ordinances are not inconsistent with the Solid Waste Management Act and DER regulations adopted pursuant thereto.[2] Since a municipality operated landfill can (and

2. 35 P. S. § 6010 provides:

(a) Each municipality with a population density of three hundred or more inhabitants per square mile shall be responsible for the collection, transportation, processing and disposal of solid wastes within its boundaries and shall be responsible for implementing their approved plan as it relates to the storage, collection, transportation, and disposal of their solid wastes.

(b) In carrying out its responsibilities, any such municipality may adopt ordinances, regulations and standards for the storage and collection of solid wastes *which shall be in conformity with the rules, regulations, standards, and procedures adopted by the department* for the storage, collection, transportation, processing and disposal of solid waste.

(c) Municipalities *may* contract with any person, other municipality, county or authority to carry out their responsibilities for the collection, transportation, processing and disposal of solid wastes.

must) be operated in conformity with the rules, regulations and procedures adopted by DER, there is no *inherent* conflict between the municipal ordinance and the Act. Consequently, the Act does not preempt municipalities from the field of landfill regulation.

II. Constitutional Validity of the Zoning Ordinance

To say that a municipality has the *power* to enact zoning ordinances for a given purpose is not, however, to sanction the exercise of that power in a manner that is repugnant to constitutionally protected rights. This brings us, therefore, to appellants' principle contention that the appellee's prohibition of private landfill operations and allowance of public (municipal) operations is arbitrary, unreasonable and discriminatory and, hence, an invalid exercise of its police powers. The right to use one's own property as he or she sees fit is a fundamental and constitutionally recognized right. U. S. Const. Amends. V, XIV; Pa. Const. Art. I, § 1. These property rights are not absolute and are subject to reasonable restrictions in the public interest. "Although zoning is, in general, a proper exercise of police power which can permissibly limit an individual's property rights, *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 475 S. Ct. 114 (1926), it goes without saying that this restriction on the individual's right . . . cannot be unreasonable. *E.g. Eller v. Board of Adjustment*, 414 Pa. 1, 198 A. 2d 863 (1964)." *Concord Township Appeal*, 439 Pa. 466, 470, n. 1, 268 A. 2d 765, 766, n. 1 (1970). The principles guiding to decision have been often enunciated by this Court.

There exists a presumption that a zoning ordinance is constitutionally valid. *Bilbar Construction Co. v. Board of Adjustment*, 393 Pa. 62, 141 A. 2d 857 (1958). The burden of establishing its invalidity is upon the party who seeks to

have it declared invalid. *Beaver Gas Co. v. Osbourne Borough*, 445 Pa. 571, 575, 285 A. 2d 501, 504 (1971). An ordinance which purports to be an exercise of the police power must not be unreasonable, unnecessary or unduly oppressive, and "*the means which it employs must have a real and substantial relationship to the objects sought to be attained.*" *Lutz v. Armour,* 395 Pa. 576, 578-79, 151 A. 2d 108, 110 (1959); *Atria, Inc. v. Board of Adjustment,* 438 Pa. 317, 264 A. 2d 609 (1970). Thus, zoning ordinances are valid whenever necessary for the preservation of the public health, safety, morals or general welfare, Pennsylvania Municipalities Planning Code, 53 P. S. § 10604 (Zoning Purposes) (1977); *Lord Appeal,* 368 Pa. 121, 125-26, 81 A. 2d 533, 535 (1951), but the power to regulate does not permit arbitrary, unreasonable or unnecessary intermeddling with private legitimate businesses. *Gambone v. Commonwealth,* 375 Pa. 547, 551, 101 A. 2d 634, 636 (1954). Clearly, as previously discussed, the operation of landfill systems is a proper subject of appellee's concern, but the zoning ordinance, and the public-private distinction therein, must bear a substantial relation to the public health, safety, morals or general welfare.

I know of no directly applicable decisions of this Court wherein a zoning ordinance was challenged because a use was permitted if executed by a municipality while prohibited if executed by a private enterprise. If government were to begin to enact laws which permitted certain entrepreneurial uses but only if the enterprise were conducted by government, it seems certain that in due course the role of government as entrepreneur would be increased to the detriment of private enterprise. It seems clear, therefore, that a zoning ordinance which permitted the operation of a gasoline station, for example, but only if run by government, would be held to be invalid. On the other hand, it is manifest that a zoning ordinance which permitted the operation of a jail, but only if run by the

government, would be constitutional. There is, therefore, a line to be drawn between land uses which the government can permit to itself but forbid to private enterprise.

Examining the record in this case, it becomes apparent that the distinction drawn by the township is an artificial one. The purported justifications offered by appellee, intervenors [3] and the Board of Supervisors in support of the distinction are essentially two. These justifications are factually contradicted by the record and each may be accomplished by less drastic means.

First, appellee and intervenors assert that permitting landfills to be operated only by municipalities will result in greater control over problem areas not covered by DER regulations (e.g. blowing litter control at landfill site) as well as more effective enforcement of DER regulations. Municipalities, the argument goes, are more responsive to "public pressure" than private enterprises and thus will be more inclined to comply with DER standards and procedures and to respond to concerns of the residents of the community. There is no factual basis for this assertion—a landfill is a landfill.[4] Problems arise without regard for the form of ownership of the operation. The testimony

3. Intervenors are landowners who own property adjacent to the proposed landfill site.

4. In *Lutz v. Armour,* 395 Pa. 576, 151 A. 2d 108 (1959), this Court recognized that garbage was garbage whether it came from within the municipality or without. In that case, a zoning ordinance permitted the operation of garbage collection and disposal facilities for garbage collected within the township (Findlay Township) but prohibited the hauling and disposal of materials originating "from without the township." We said: "[I]n effect the ordinance . . . declares that garbage from without . . . is harmful and deleterious, but that local garbage . . . conforms more to the community's health and general welfare standards. This distinction sought to be made is both artificial and devoid of merit." But *cf. Daugherty v. Messner,* 404 Pa. 235, 172 A. 2d 288 (1961) (ordinance upheld which prohibited new garbage dumps but permitted an existing one in a district since operator had been operating for quite some time and had been operating under a court order requiring him to use best available methods).

given at the hearing by DER officials indicates that municipalities suffer from non-compliance as often as do private companies—"public pressure", it appears, is no talisman warding off the evils of landfills. If anything, the record suggests that DER may be more inclined to be lenient with municipal operations than with private. Further, the preference expressed in the Solid Waste Management Act for private operations contradicts the assumption that municipalities are better able to achieve compliance with DER regulations than are private entrepreneurs.[5]

Even if there were a factual basis for the proposition that municipalities are more effective enforcers, the blanket prohibition of privately operated landfills sweeps too far. The existence of available alternatives that are less obnoxious to constitutionally protected rights renders that prohibition unnecessary and unreasonable. *See National Land and Investment Co. v. Board of Adjustment*, 419 Pa. 504, 215 A. 2d 597 (1965) (less drastic means were available to accomplish township's legitimate goals of providing adequate sewerage—partly for this reason, the zoning ordinance was unreasonable and unnecessary); *Concord Township Appeal*, 439 Pa. 466, 268 A. 2d 765 (1970) (same); *Exxton Quarries, Inc. v. Board of Adjustment*, 425 Pa. 43, 228 A. 2d 169 (1967) (total prohibition of quarrying operation swept too far—less drastic means available). In this case, the Board of Supervisors found that appellants were willing to accept reasonable controls by the township. Further, the township could, under the authority of the Second Class Township Code, enact reasonable and specific ordinances to deal with specific problems which ordinances

5. The Board found that public landfills have been "in fact, more responsive to community needs" than private landfills. There is no support for this finding in the record. A DER official testified that in a particular case, a municipality had been very responsive to community needs—he did not testify that the municipality or municipalities generally were more responsive than private businesses.

would go no further than necessary to correct the particular problem so long as the regulation was not inconsistent with DER regulations, standards and procedures. 35 P. S. § 6010. For example, the problem of blowing litter could be met by requiring the erection of snow fencing and/or daily policing of the area.

It is also asserted that a municipality has no assurances of the financial solvency of a private operator of a landfill and that the danger of the operator's potential bankruptcy can be solved by permitting municipal operators only. Again, there is no support in the record for this assertion. A DER official testified that in his many years of experience he had never experienced or heard of a private sanitary landfill becoming insolvent, but that he had experienced situations where municipal authorities had used financial difficulties as an excuse for their failure to comply with DER regulations. And, once again, there are less drastic means available to the township to protect against financial insolvency since the Board found that DER had a fund available to use if an operator withdraws or goes bankrupt.

Since there is no basis in fact for the proposition that the public-private distinction bears a substantial relationship to the public health, safety, morals or general welfare, and since any concerns can be protected through means less obtrusive to the property owner's rights, I would hold that the London Grove Township zoning ordinance is an arbitrary, unreasonable and unnecessary exercise of the police power and is, therefore, invalid. While no hard and fast constitutional line of permissible vs. prohibited distinctions should be drawn, it is clear that the township has in this case enacted an ordinance falling on the impermissible side of that line. Accordingly, I would reverse and remand for proceedings consistent with this Opinion.

Mr. Justice Manderino joins in this Opinion in Support of Reversal.

OPINION OF THE SUPREME COURT OF PENNSYLVANIA IN SUPPORT OF AFFIRMANCE.

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[188]

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 482 January Term, 1978

Appeal from Order dated February 1, 1978 of the Commonwealth Court of Pennsylvania (No. 495 C. D. 1977). Affirming the Order of the Court of Common Pleas of Chester County at No. 137 June Term, 1976, Zoning Appeal.

EDWARD F. KAVANAGH, HUSTON T. ADAMS and ROBERT M. ABERNETHY,

Appellants

v.

LONDON GROVE TOWNSHIP

and

DANIEL E. BLEVINS, HELEN K. BLEVINS, SAMUEL L. COATES, ELKINS WETHERILL, HARRIET WETHERILL, JESS E. BEWLEY, EVELYN D. BEWLEY, ANNA BARLOW, MARY HELEN PIERCE, JULIUS J. WILLA, JR., JOHN SPEAKMAN and BOOTH YARNALL

OPINION IN SUPPORT OF AFFIRMANCE.

ROBERTS, *J.* Filed July 6, 1979

Today Mr. Justice Larsen declares that a township unconstitutionally exercises its police power under Village of *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 45 S. Ct. 114 (1976) [*sic*] and *Exton Quarries, Inc. v. Bd. of Adjustment*, 425 Pa. 43, 228 A. 2d 169 (1967), by limiting, under a provision of its zoning, operation of sanitary landfill to a municipality or a municipal authority. It is evident, indeed, cannot be disputed, that sanitary landfill operations affect the health and safety of a community. I would hold, therefore, as the Board, the Court of Common Pleas of Chester County, and the Commonwealth Court, that the township's concerns for public health, manifested by its enforcement of sanitary regulations, and the continued operational stability of township's sanitary landfill operations is entirely reasonable. This governmental exercise of its police function simply cannot be judged so unrealistic as to make the zoning provision unconstitutionally arbitrary.

Reliance on *Exton Quarries*, supra, is entirely misplaced. There, a private quarry business purchased property and established itself in a community which had no zoning ordinance. In response, that community passed an exclusionary ordinance, absolutely prohibiting quarrying. We held, there, that we would not permit use of zoning ordinances to accomplish an unconstitutional exclusion of a legitimate business. Exclusionary zoning cannot be justified merely by a community's preference that certain businesses locate outside its borders. *Exton Quarries*, supra, 425 Pa. at 59-60, 228 A. 2d at 179. Here, however, there is no question of exclusionary zoning and no question of any provision of the zoning ordinance being used

as a device to exclude lawful but undesirable activities. Here, the means chosen (the challenged zoning ordinance provision) is indeed rationally related to a legitimate public end (protection of the community's health and safety). That this ordinance meets the requirements of due process cannot be disputed.

I would, therefore, affirm the unanimous order of the Commonwealth Court, affirming the order of the court of common pleas affirming of the order of the London Grove Township's Board of Supervisors denying appellants of an amendment to the zoning ordinance permitting private operation of sanitary landfills.

Mr. Justices O'Brien and Nix join in this Opinion in Support of Affirmance.

OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA.

IN THE

COMMONWEALTH COURT OF PENNSYLVANIA

No. 594 Commonwealth Docket 1977

EDWARD F. KAVANAGH, HUSTON T. ADAMS AND ROBERT M. ABERNETHY,
Appellants

v.

LONDON GROVE TOWNSHIP et al.,
Appellees

BEFORE:

HONORABLE JAMES S. BOWMAN, President Judge
HONORABLE JAMES C. CRUMLISH, JR., Judge
HONORABLE ROY WILKINSON, JR., Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge
HONORABLE RICHARD DiSALLE, Judge

ARGUED: December 7, 1977

OPINION

FILED
OPINION BY JUDGE WILKINSON, JR. February 1, 1978

This case is on appeal to this Court from an Order of the Court of Common Pleas of Chester County affirming the dismissal by the London Grove Township Board of Supervisors of a curative amendment application. This application was filed by the three appellants, who are the equitable owners of a 79.6 acre tract of land located in an R-1 zoning district in London Grove Township (Township). The R-1 district is primarily a residential area, but does allow for the operation of a sanitary landfill provided it is operated by a municipal authority or a municipality. The curative amendment submitted by the appellants would alter this provision of the Township zoning ordinance so as to allow for privately-owned and operated landfills, since it is the desire of the appellants to establish a landfill on their tract of land. Their curative amendment application has been opposed by a number of landowners whose properties are in close proximity to the appellants' land, and these landowners have formally intervened in the case.

The appellants primarily contend that the zoning ordinance in question is exclusionary, discriminatory, arbitrary and unconstitutional. We cannot agree, primarily because we do not find the ordinance to be exclusionary. Sanitary landfills are a permitted use within the Township, except that they must be operated by either a municipality or a municipal authority. The decision of the Township to so limit landfills is a legislative one, and one which is explicitly reserved to the Township under the provisions of Section 702 of The Second Class Township Code, Act of May 1, 1933, P.L. 103, *as amended*, 53 P.S. § 65708. *See Daugherty v. Messner*, 404 Pa. 235, 172 A.2d 288

(1961). We find no support for appellants' contention that this decision is arbitrary and discriminatory, and thereby unconstitutional. In addition, because there is no total prohibition provided in this case, the rationale of cases such as *General Battery Corp. v. Zoning Hearing Board*, 29 Pa. Commonwealth Ct. 498, 371 A. 2d 1030 (1977), is not applicable.

The appellants' remaining arguments are also without merit. First, appellants contend that the Pennsylvania Solid Waste Management Act (Act), Act of July 31, 1968, P. L. 788, *as amended*, 35 P. S. § 6001 et seq., and the regulations issued pursuant to that Act, have resulted in a limited pre-emption of the field of sanitary landfill that precludes the Township from enacting the type of zoning regulation under consideration. In light of our Supreme Court's decision in *City of Pittsburgh v. Commonwealth*, 468 Pa. 174, 360 A. 2d 607 (1976), and our own recent decision in *Greene Township v. Kuhl*, Pa. Commonwealth Ct. , A. 2d (No. 1899 C. D. 1976, filed December 8, 1977), we hold that there is no pre-emption in the field of sanitary landfills that prevents the Township from limiting landfills within its boundaries to those operated by municipalities or municipal authorities. Nor can we accept appellants' argument that the Township's ordinance is in any way inconsistent with the legislative policy enunciated in the Act and the accompanying regulations. The Act merely suggests that private resources be used wherever *feasible and desirable*, but does not affirmatively require their utilization. Obviously the Township has in this case decided that privately operated landfills are not feasible and desirable, and we will not interfere with that decision.

The appellants next argue that the zoning ordinance is unlawful in that it regulates *who* may use property,

rather than the use to which that property may be put. We find no support for this contention, since it is clear that the ordinance in question merely regulates the manner in which appellants may use their property in the R-1 district. The appellants' final position, that the burden of proof in this case rested with the Township, is meritless due to our finding that there is no total exclusion by the Township's zoning ordinance.

Accordingly, we will enter the following

ORDER

And Now, February 1, 1978, the order of the Court of Common Pleas of Chester County, at No. 137 June Term, 1976, dated March 2, 1977, is affirmed.

Roy Wilkinson, Jr.
Roy Wilkinson, Jr.,
Judge

ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

No. 594 Commonwealth Docket 1977

EDWARD F. KAVANAGH, HUSTON T. ADAMS AND ROBERT M. ABERNETHY,
Appellants

v.

LONDON GROVE TOWNSHIP et al.,
Appellees

ORDER

And Now, February 1, 1978, the order of the Court of Common Pleas of Chester County, at No. 137 June Term, 1976, dated March 2, 1977, is affirmed.

Roy Wilkinson, Jr.
Roy Wilkinson, Jr.,
Judge

DECISION AND ORDER OF THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA.

IN THE
COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

No. 137 JUNE TERM, 1976
ZONING APPEAL

IN RE: APPEAL OF EDWARD F. KAVANAGH, HUSTON T. ADAMS, and ROBERT J. ABERNETHY,
Appellants

v.

LONDON GROVE TOWNSHIP

DECISION

FILED: March 2, 1977

In 1974, the Board of Supervisors of London Grove Township adopted "The London Grove Township Zoning Ordinance of 1974." Pursuant to those provisions, appellants' land was located in an R-1 District. On February 3, 1975, an amendment to the zoning ordinance was adopted which inter alia provided that ownership, operation and use of a sanitary landfill was permitted within the R-1 and

R-2 Districts but only when operated by a municipal authority or a municipality. Pursuant to the provisions of the MPC, appellants filed a petition for curative amendment seeking to amend the ordinance to provide that sanitary landfills be permitted in the R-1 District as a conditional use subject to certain other standards.

The gist of the proposed amendment was to remove the restriction that only municipalities or municipal authorities could own, operate or use a sanitary landfill in the township. After hearings held, the Board of Supervisors entered its decision, including findings of fact and conclusions of law, denying the application. Appellants then filed this appeal. *Certain other parties intervened.*

Having made findings of fact and no additional evidence being taken by the court, those findings may not be disturbed if they are supported by substantial evidence. *Ellick v. Board of Supervisors, Worcester Twp.*, 17 Pa. Commonwealth Ct. 404, 333 A. 2d 239 (1975). In the appeal filed, those findings are not challenged.

It now is our burden to decide the purely legal question of whether the challenged zoning ordinance is legal or constitutional. *Ellick*, supra.

In this context the issue raised is whether or not an ordinance that permits sanitary landfills only if owned, operated or used by municipalities or municipal authorities is legal or constitutional.

Appellant argues that the ordinance is unconstitutional in that it excludes private ownership, operation and use of sanitary landfills.

Preliminarily it should be noted that similar problems have arisen, albeit in different proceedings, which have eloquently described similar operations. In *Lees v. Sampson Land Company*, 372 Pa. 126, 92 A. 2d 692 (1952), certain citizen landowners sued in equity to enjoin the

erection of a sewage disposal plant. *Wilkinsburg-Penn Joint Water Authority v. Borough of Churchill,* 417 Pa. 93, 207 A. 2d 905 (1965) dealt with a borough's efforts to enjoin construction of a water tank. In an eminent domain proceeding, *Upper Dublin Township Authority v. Piszek,* 85 Montg. Co. L. R. 197 (1965) the court was faced with a sewage disposal plant. Likewise in *Greater Greensburg Sewage Authority v. Hempfield Township,* 5 Commonwealth Ct. 495, — A. 2d — (1972) the court dealt with a complaint in equity seeking to enjoin prosecution and enforcement of an ordinance alleged to be invalid dealing with the depositing of solid waste resulting from industrial, commercial, agricultural and residential activities.

Initially we need decide whether or not there is a total prohibition of the proposed use in the township. We find there is not. The use is that of a sanitary landfill and that *use* is permitted, although limited. More pointedly the question, if any, is whether the permitted use as an adjunct of municipal services is a denial of equal protection in that the ordinance restricts ownership to a municipality or municipal authority.

Zoning which merely accords special recognition to special circumstances is not improperly discriminatory. There is ample state legislation to warrant the findings that landfills warrant special recognition.[1]

Further, the testimony and findings of the board indicate a proper nexus between the control of the use and the public safety, health, comfort and general welfare of the community. See e.g. *Appeal of Mobil Oil Company,* 21 Commonwealth Ct. 295, 345 A. 2d 313 (1975).

1. The Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. (1965) 1535, 35 P. S. 750.1 et seq., and the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, as amended, 35 P. S. § 6001 et seq.

Under such circumstances, the existing regulation cannot be said to be unconstitutionally discriminatory, arbitrary, capricious or unreasonable, nor can it be found to be an abuse of legislative discretion.

Appellants next argue that the enabling legislation (MPC) does not give the township the authority to classify or restrict private sanitary landfills. We could rely on the distinction drawn between "governmental" or "proprietary" uses, but further can look to the purpose announced in the MPC itself. 53 P. S. § 10105 and § 10601. As pointed out by Judge Rogers in his concurring opinion in *Greater Greensburg Sewage Authority,* supra, it is not a total preemption by the Commonwealth of Pennsylvania but rather the enactments by the state legislature resulted in a limited preemption of the field of regulation of sewage facility operations which may be subject to certain zoning regulations provided they are not contradictory to, or inconsistent with the state staute. We do not find that the language in the zoning regulation is inconsistent with the language in the Solid Waste Management Act or the Pennsylvania Sewage Facilities Act. Indeed our Supreme Court in the case of *City of Pittsburgh v. Commonwealth,* — Pa. —, 360 A. 2d 607 (1976) clearly indicates that unless the legislative intent is clearly shown to immunize the use from local zoning regulations, the proposed use then is subject to the zoning regulations.

Finally, appellant argues that the regulation fosters monopolies and tends to restrict competition. The deep involvement of government at all levels in regulating landfill operations because of the health hazards created thereby does not support appellants' theory. Indeed, the policy enunciated seems to be to the contrary. Whether or not restrictions in this area on competition is necessary is best left to the legislature or the economy itself—but not to the Courts.

In view of the above we will enter the following Order.

ORDER

AND Now, this 2nd day of March, 1977, the Appeal is denied.

The decision of the Board of Supervisors is affirmed.

By THE COURT:

JOHN M. WAJERT

J.

DECISION OF THE BOARD OF SUPERVISORS OF THE TOWNSHIP OF LONDON GROVE, PENNSYLVANIA

BEFORE THE BOARD OF SUPERVISORS
TOWNSHIP OF LONDON GROVE

IN RE: APPLICATION OF
EDWARD F. KAVANAGH, HUSTON T. ADAMS and ROBERT M. ABERNETHY
Appellants

FINDINGS OF FACT

The matter set forth hereinafter concerns an application by Messrs. Kavanagh, Adams, and Abernethy, who have associated together for the purpose of operating a sanitary landfill in London Grove Township, Chester County, Pennsylvania. They appeared as parties before the Board represented by their attorney, George A. Brutscher, Esquire. Various property owners, represented by Robert W. Lentz, Esquire, formally appeared in opposition to the application. There were no other formal parties before the Board.

The application itself was for a curative amendment, and challenged the legitimacy of the London Grove Township Zoning Ordinance as it applied to private landfills.

The various hearings in this matter were duly advertised, and were held on the evenings of February 4, March 9, March 24, March 25, and April 14, 1976, during which hearings the following facts were established:

LANDFILL PROCEDURES

1. An Applicant seeking to establish a landfill in the Commonwealth of Pennsylvania must submit to compre-

hensive procedures established by the Department of Environmental Resources (DER), pursuant to the Pennsylvania Solid Waste Management Act (Act 241), as supplemented by Chapter 75 of the DER Rules.

2. The cognizant local office of the DER is situated in Norristown, Pennsylvania, and has six employees who inspect landfill sites monthly, without prior announcement.

3. Chester County has a solid waste coordinator, a one-man department.

4. The responsibility for enforcement lies with the DER.

5. The DER has a fund available to use if an operator withdraws or goes bankrupt.

6. The problem with papers blowing off trucks is generally left to the local authorities, but DER does have regulations regarding the types of trucks to be used.

7. The DER can require bonding of private applicants in some situations, but this usually applies to matters involving industrial waste.

8. The DER will advise applicants to comply with local regulations, even though local Health Departments have no enforceable jurisdiction. Local regulations can be more stringent than those imposed by DER, but not less.

9. The DER has methods of monitoring the contamination of subsurface waters, but cannot say if its monitoring is 100% effective.

Landfill Attributes

10. A landfill, as contemplated in these hearings, is essentially a system for storing and covering solid waste upon open areas of real property.

11. An uncontrolled operation, that is, one which does not have adequate cover provisions or adequate controls against leaching into sub-surface waters, and other recommended controls, can be a health hazard.

12. There are a number of landfills in southern Chester County, but the only one serving the area generally is the Southeastern Chester County Refuse Authority, at present.

13. Landfill terminology uses the expressions "lift", which is a row of rubbish covered by dirt, and "cells", which is a body of rubbish so covered. Generally speaking, a lift must be at least six feet above ground water level, and is ordinarily eight feet high with a daily cover of six inches of dirt, with the highest lift then covered by an additional two feet of compacted earth and vegetation.

14. A sanitary landfill is the most suitable method of disposing of large quantities of solid waste presently available for the Southern Chester County region.

15. Following the use of a landfill, there are restrictions on building and use of the site, and it is ordinarily recommended that such sites be kept as open space.

16. "Leaching", that is, the washing or cleansing action of liquids percolating through the landfill site, can continue on a landfill for up to two hundred years, and may or may not constitute a hazard to the sub-surface waters, depending on the design of the landfill or the attributes of the underlying soil.

17. Landfills generate methane gas from decomposition, which must be vented to the atmosphere, and which should be dissipated within a year or year and a half following placement. Methane gas can pose a danger to health.

Private v. Public

18. The DER regulations apply equally to public and private landfills.

19. Private operators are entitled to admit or exclude anyone they wish, and to charge whatever price they wish.

20. A Municipal authority has no guarantee of financial solvency, but does have public funds available to it for continued operations.

SUITABILITY OF SITE

21. The proposed site would be in a convenient location to serve the requirements of Southern Chester County, as the currently operating site in Kennett Township has; in addition, a proposed site in Newlin Township may also be able to serve Southern Chester County.

22. The proposed site is located in an R-1 district, which permits primarily residential uses; the proposed site would be essentially surrounded by single family dwellings on large lots or small farms.

23. The proposed site is bounded by two major roads, Route 41 and 926, with 200 feet frontage on Route 41 and 2,000 feet frontage on Route 926.

24. The soil types present on the tract are suitable for landfill use, and the soils are deep and well drained.

25. The site has an estimated useful life of twenty (20) years.

26. The site has a present rat problem, and was rejected by the Southeastern Chester County Refuse Authority for that reason, and also for the reason that the Authority was only offered a portion of the site for use.

27. The Township Engineer, who conducted a study of various sites within the Township for locating a landfill, concluded that this site was the best available in the Township.

28. The Township Planning Commission has recommended rejection of this site for a number of reasons set forth in its letter submitted to the Board, and particularly for the reason that they don't wish to see a commercial use in a residential district.

29. A number of adjoining residents and property owners objected to a landfill at this location because of possible surface and sub-surface water contamination, the valuation of property, danger to children, possible presence and encouragement of vermin, and blowing trash.

APPLICANT'S PROPOSALS

30. Applicant proposed an area method of fill, whereby the fill is laid over a large area, with cover as the operation proceeds, as opposed to the trench method, which involved digging slits in the ground.

31. Applicants would work on two to four acres at a time, and would begin their fill in the northeast section near the access road. Exhibit A-10 indicates how the site would be laid out.

32. The Applicants propose to service the Southeastern Chester County area, and will permit only solid municipal and commercial refuse and non-toxic industrial materials. There will be no liquid waste, no oil, and no junked autos.

33. They anticipate a total of 15 to 20 trips to the site per day, and will recommend to users of the site that they use closed trucks.

34. They will accept sewage sludge.

35. They plan fencing around the access area and snow fencing around the working areas, to control blowing paper. They may also fence the ponds and some of the boundaries.

36. They would accept certain reasonable controls on their operation, as set forth in the testimony of one of the partners, Mr. Kavanagh.

* * *

Inasmuch as the Board of Supervisors wishes to withhold the rendition of its decision, as required by law, until a public meeting can be held, it should be noted that not all the Supervisors subscribed to all the arguments and comments set forth hereinafter. Those arguments designated "Reasons for rejecting application" represent some or all of the reasons considered by the Supervisors who wish to turn down the application, and those reasons

labelled "Reasons for approving the application" represent some or all of the arguments advanced by those wishing to approve the application. Section labelled "Controls" represent those matters which the Supervisors feel should be imposed upon the operation of a private landfill in London Grove Township, whether the application is either approved by this Board of Supervisors, or upon appeal from an adverse decision, by a Court of Record having jurisdiction.

The Board wishes to thank Messrs. Brutscher and Lentz for an able and thorough presentation of the evidence, and of the legal arguments in support of each position.

Reasons for Approving the Application

Applicants contend that the distinction between commercial and municipal landfills bears no relation to the role and purposes of zoning in the community: *Appeal of Valhalla Gun Shop, Inc.*, 19 Chester County 103. As far as the state and the public is concerned, the operation will appear the same to the viewing public, and will be subject to the same set of state regulations. Therefore, there is no basis for distinctive zoning treatment.

Furthermore, a landfill is a legitimate business, and protected by that long series of Court cases which require townships to accommodate legitimate businesses absent sound reasons to the contrary: *e.g., Beaver Gas Co. v. Osborne Borough*, 445 Pa. 571, 285 A. 2d 501 (1971). Indeed, in view of the eventual closing of the Kennett Township Landfill, the need for a landfill in this area seems particularly urgent, and the testimony of the Township Engineer was to the effect that, at least within London Grove Township, the location selected by these Applicants was an optimum location.

Reasons Against Granting the Application

Opponents of the application contend that the above zoning cases are not applicable because the *use* in question, sanitary landfills, had not been entirely excluded from the township. The township has sought only to control the person or entity who would operate that use.

The Second Class Township Code, 53 P. S. Sec. 65708, authorizing the Township "to regulate or prohibit the dumping or otherwise depositing of ashes, garbage, rubbish, and other refuse materials in the Township", gives the Township far broader powers over landfills than over other types of business uses: *Daugherty v. Messner*, 404 Pa. 235, 172 2nd. 288 (1961).

It is permissible to distinguish between public and private landfills, because of the degree of control which a township is able to exercise over municipal landfills in order to promote the health, welfare and safety of the public. Although the state regulations do not distinguish between public and private landfills, the former have, in fact, been more responsive to community needs than the latter.

Controls

In the event this application is approved, either now or in the future by the Court, the Board adopts or intends to impose the following additional controls:

1. That the landfill accept only solid municipal and commercial refuse; no liquid waste, no toxic industrial materials, no oil and no junked vehicles.
2. That the landfill accept loads only from covered trucks.
3. That all working areas be fenced around the perimeters thereof with suitable fencing at least three feet in height, to control blowing papers.

4. That the landfill be open only between the hours of 8:00 a.m. and 6:00 p.m., Monday through Saturday, for the acceptance of refuse and the operation of machinery and equipment.

5. That the access and working areas be patrolled daily for the cleaning up of debris.

6. That the operators post a bond, in form acceptable to the Township Solicitor, in an amount equal to the cost of one year's operation of the landfill, as that cost shall be determined by the Township Engineer, conditioned upon continued compliance with these and all other applicable state and local laws, ordinances, and regulations governing the operation of the landfill.

CONCLUSIONS OF LAW

Those Supervisors who vote to approve the application subscribe to the following conclusions of law:

1. That the Applicant has standing to seek a curative amendment.

2. That the Zoning Ordinance of London Grove Township, as of the time the application was submitted, impermissibly denies the right to landowners in London Grove Township to conduct privately-operated landfills in the Township.

3. That the proposed curative amendment will promote the health, safety, and welfare of the Township.

4. That the proposed curative amendment be, and hereby is, ordained as part of the Zoning Ordinance of London Grove Township.

BOARD OF SUPERVISORS
LONDON GROVE TOWNSHIP

_____

_____

_____

Those Supervisors who vote to disapprove the application subscribe to the following conclusions of law:

1. That the ordinance of London Grove Township, as of the date of this application, is valid and constitutional, and does not improperly exclude or discriminate against privately-operated landfills.

2. That the application should be denied.

3. That the Township Planning Commission be requested to give continuing attention to the question of sanitary landfills in the Township, including but not limited to: location of such landfills in the Industrial and Commercial areas of the Township; establishment of transfer stations; and joint cooperation with other municipalities in selecting a suitable site.

BOARD OF SUPERVISORS
LONDON GROVE TOWNSHIP

LESLIE Y. WESTON, JR.

DOMINICK DIFILIPPO

ROBERT E. HEIBECK

June 7, 1976

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

IN THE
COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

No. 137, JUNE TERM, 1976
ZONING APPEAL

IN RE: APPEAL OF EDWARD F. KAVANAGH, HUSTON T. ADAMS, and ROBERT M. ABERNETHY
Appellants

v.

LONDON GROVE TOWNSHIP

Notice is hereby given that Edward F. Kavanagh, Huston T. Adams, and Robert M. Abernethy, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Pennsylvania entered on July 6, 1979 (No. 482, January Term, 1978) and the denial of appellants' timely Petition for Reargument entered on August 22, 1979, affirming the Order of the Commonwealth Court of Pennsylvania entered on February 1, 1978 (No. 594 C. D. 1977), affirming the Order of the Court of Common Pleas of Chester County entered on March 2, 1977 (No. 137, June Term, 1976).

This appeal is taken pursuant to 28 U. S. C. § 1257(2).

Of Counsel:

DILWORTH, PAXSON, KALISH, LEVY & KAUFFMAN

/s/ JOHN F. STOVIAK
John F. Stoviak
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Attorney for Appellants

AFFIDAVIT OF SERVICE.

I hereby certify that on this 5th day of November, 1979, one copy of this Notice of Appeal was served, by first class mail, postage prepaid on the following attorneys:

Lawrence E. Wood, Esquire
126 West Miner Street
West Chester, Pennsylvania 19380

Robert W. Lentz, Esquire
30 Darby Road
Paoli, Pennsylvania 19301

I further certify that all parties to the proceeding in the court where the judgment appealed from was issued have been served.

Of Counsel:

DILWORTH, PAXSON, KALISH, LEVY & KAUFFMAN

/s/ JOHN F. STOVIAK
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Attorney for Appellants

Supreme Court, U. S.
FILED
DEC 18 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-787

EDWARD F. KAVANAGH, HUSTON T. ADAMS
and ROBERT M. ABERNETHY,
Appellants,

v.

LONDON GROVE TOWNSHIP, *et al.*,
Appellees.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA
No. 482 JANUARY TERM 1978.

JURISDICTIONAL STATEMENT
MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1979

No. .....

EDWARD F. KAVANAGH, HUSTON T. ADAMS and
ROBERT M. ABERNETHY,

Appellants,

v.

LONDON GROVE TOWNSHIP, *et al.*,

Appellees.

Appeal From the Supreme Court of Pennsylvania
No. 482 January Term 1978

JURISDICTIONAL STATEMENT

Motion to Dismiss or Affirm

Comes now appellee in the above-captioned matter, London Grove Township, and moves this Honorable Court either to dismiss the appeal of Messrs. Kavanagh, *et al.*, or in the alternative, to affirm the judgments of the Courts below, for the following reasons:

1. *Appellant failed to preserve for appeal its second argument, to wit: that there are alternate means, less constitutionally defective, of accomplishing the same goals.* At-

tached hereto as Exhibit "A" is the statement of the questions presented in the case taken from appellant's brief in the Supreme Court of Pennsylvania. These were the issues presented below, and they do not encompass the second argument.

2. *Appellant failed to preserve its third argument, to wit: excessive governmental control, in the form in which it is now presented.* In the Courts below, appellant argued against the ordinance because of claimed state pre-emption (Exhibit A, question 2) or in terms of proper zoning objectives (question 4). Governmental control as a federal constitutional issue was not presented as a question below.

3. *It is not a "federal question" that alternative methods exist for accomplishing the same goal.* (Argument No. 2). This argument is relevant only if the methods chosen are constitutionally deficient. That is the real issue, and it is appellee's contention that the means chosen by London Grove Township to preserve the integrity of its highest residential district (R-1) rationally promote legitimate objectives: see *Arlington County Board v. Richards*, 434 U.S. 5, 54 L. Ed. 2d 4, 98 S. Ct. 24 (1977).

4. *A right to interstate travel and commerce is not involved.* Appellant cites *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), a case which involved state prohibition of out-of-state rubbish. However, there, there is no such distinction here. This case deals with municipal versus private commercial uses.

5. *The distinction between municipal and private commercial uses does not present a substantial federal question.* (Appellant's argument No. 1):

a. *All* zoning involves distinctions between types of uses. The basic state legislation here (The Pennsylvania

Municipalities Planning Code, Act of July 31, 1968, P.L. 805, as amended; 53 P.S. § 10101, *et seq.*, in § 605, under the heading "Classifications", authorizes municipalities to regulate and restrict uses near "public buildings and public grounds". Municipal uses are almost universally put in different classifications from commercial uses, although there may be points of similarity between the two, *e.g.* office buildings. There may be distinctions which are so egregious as to invite the Court's attention; this is not one of them.

b. All three levels of courts which have considered this matter have affirmed the decision of the Township Board of Supervisors. Thus, there is no judicial conflict.

c. There is no evidence of discriminatory intent, as was presented in *Arlington Heights v. Metro. Housing Corporation*, 429 U.S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977), so as to indicate a violation of the equal protection clause.

d. No fundamental rights, such as the right to travel, lack of due process, voting, privacy, assemblage, etc., are involved: *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974).

For the foregoing reasons, appellee asks either that the appeal be dismissed, or that the decision of the Courts below be affirmed.

Respectfully submitted,

WOOD PARKE BARNES & BYRNE,
A. THOMAS PARKE, III,
Attorneys for London Grove Township.

Affidavit of Service

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. .....

EDWARD F. KAVANAGH, HUSTON T. ADAMS and ROBERT M. ABERNETHY,

Appellants,

vs.

LONDON GROVE TOWNSHIP,

Appellee.

I hereby certify that on this seventh day of December, 1979, one copy of this Brief was served, by first class mail, postage prepaid on the following attorneys:

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A. THOMAS PARKE, III,
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EXHIBIT "A"

Statement of Questions Involved

1. Is a zoning ordinance valid and constitutional when it prohibits private enterprise ownership and operation of a Department of Environmental Resources permitted sanitary landfill, a legitimate and vitally necessary business activity; but permits the same, at least in theory only by a municipality or a municipal authority? Affirmed.

2. Is a zoning ordinance which seeks to prohibit, regulate or control sanitary landfills beyond that of geographical locations within zoning districts invalid because its subject matter (i.e. the regulation of sanitary landfills) has been pre-empted by state legislature and regulation on the same subject? Negatived.

3. Is a second class township zoning ordinance invalid and in violation of *the second class township code* because it is inconsistent with or contrary to legislative policy, permits and/or rules, regulations, standards, procedures and plans of an instrumentality of the Commonwealth of Pennsylvania, viz.: Pennsylvania Department of Environmental Resources? Negatived.

4. May a township under the guise of a zoning ordinance prohibit a legitimate and necessary business activity within its borders by restricting said activity to municipalities or municipal authorities (which, in fact, do not provide such activity); and, is such prohibition violative of the *Pennsylvania Municipalities Planning Code* as being designed to achieve an improper zoning objective and purpose (viz.: the classification and restriction of a particular class of landowner, rather than the classification and restriction of structures and land uses)? Affirmed.

Supreme Court, U. S.
FILED
JAN 4 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1979
No. 79-787

EDWARD F. KAVANAGH, HUSTON T. ADAMS and ROBERT M. ABERNETHY,
Appellants

v.

LONDON GROVE TOWNSHIP, et al.
Appellees

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, NO. 482 JANUARY TERM 1978

JURISDICTIONAL STATEMENT MOTION OF DANIEL E. BLEVINS AND HELEN K. BLEVINS TO DISMISS OR AFFIRM

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In The
Supreme Court of the United States

October Term, 1979

No. 79-787

EDWARD F. KAVANAGH, HUSTON T. ADAMS and ROBERT M. ABERNETHY,
Appellants,

v.

LONDON GROVE TOWNSHIP, et al.,
Appellees.

Appeal From the Supreme Court of Pennsylvania
No. 482 January Term 1978

JURISDICTIONAL STATEMENT

Motion to Dismiss or Affirm

Comes now Daniel E. Blevins and Helen K. Blevins, Intervening Appellees in the above-captioned matter, and move this Honorable Court either to dismiss the appeal of Messrs. Kavanagh, *et al.*, or in the alternative, to affirm the judgments of the Courts below, for the following reasons:

1. *The appeal is not within the jurisdiction of this Court, in that it was not taken in conformity with the statutory requirement that it be taken within ninety (90) days after the entry of final judgment. 28 U.S.C.A. Section 2101(c) (1961).* An appeal to the Supreme Court of the United States from a final judgment or decree in a civil action before the Supreme Court of Pennsylvania must be taken within ninety (90) days after the entry of such judgment or decree. 28 U.S.C.A. Section 2101 (c) (1961). In this instance the Supreme Court of Pennsylvania entered final judgment in the above-captioned matter on July 6, 1979. Thereafter appellants filed a petition for reargument and on August 22, 1979, that petition was denied by the Court. The above-captioned appeal was taken on November 5, 1979, 122 days after the date of final judgment, but only 75 days after the date of denial of the petition for reargument. The question presented is whether a petition for reargument automatically tolls the appeal period.

This question has been presented to this Court at various times in the past. The most widely cited case with respect to this question is *Citizen's Bank of Michigan City, Indiana v. Opperman,* 249 U.S. 448 (1919). In that case this Court stated:

> Where a petition for rehearing is entertained the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of and the three-month limitation begins to run from the date of such denial or other disposition.

Other cases are in accord. *Gypsy Oil Co. v. Escoe,* 275 U.S. 498 (1927); *Chicago Great Western R.R. v. Basham,* 249 U.S. 164 (1919); *Northern Pacific R.R. Co. v. Holmes,* 155 U.S. 137 (1894).

However, Intervening Appellees believe that there is one overriding distinguishing factor between all of the above cases and the present appeal. In the above cases the respective state law provided that a petition for reargument filed with the relevant state court acted as a tolling or suspension of the final judgment of that court until completion of consideration of the petition for reargument. *See Gentry v. Ragan,* 13 N.E.2d 872 (Ind. 1938); *Wilson v. Katzer,* 226 P.2d 910 (Wash. 1951). However, this is not the case in Pennsylvania. The courts of Pennsylvania have continuously held that the filing of a petition for reargument "will not affect the final judgment unless the Court retains control, as for example, by staying all proceedings in the meanwhile." *Baily Petition,* 365 Pa. 613, 618, 76 A.2d 645, 648 (1950). See also *Smith v. Jones,* 369 Pa. 13, 85 A.2d 23 (1952); *Silver, Lovitz and Atkinson v. Scaltrito,* 239 Pa. Superior Ct. 253, 361 A.2d 705 (1976).

The reasoning behind the Pennsylvania position appears to arise from both the nature of a petition for reargument and the Pennsylvania practice in considering such a petition. First, the nature of a petition for reargument is dramatically different from that of a petition or request for retrial. The petition for reargument is merely a petition for reconsideration by the court last rendering judgment. In this case the petition took the form of a request by the Appellants to the Pennsylvania Supreme Court to rehear argument on the case in which the Court had already issued final judgment. The petition did not request the reopening of any proceeding at

which the taking of additional testimony or re-examining of witnesses could be conducted.

The procedure in Pennsylvania for disposing of a petition for reargument or reconsideration lends further support to the position by the Pennsylvania courts that such a petition does not toll or affect the finality of the judgment. In Rules 2541 through 2547 of the Pennsylvania Rules of Appellate Procedure, which are appended hereto as *Appendix A*, the Supreme Court of Pennsylvania has provided the practice for consideration of applications for reargument. Rule 2543 states: "Reargument before an appellate court is not a matter of right, but of sound judicial discretion, and reargument will be allowed only when there are compelling reasons therefore." Pa. Rules of Appellate Procedure, Section 2543. While the rules set forth the contents for an application for reargument, and include a provision that there shall be no supporting brief filed by the petitioner, they further provide in Rule 2545, Pa. Rules of Appellate Procedure, Section 2545:

> No answer in opposition or separate motion to strike an application for reargument would be received unless requested by the Court. No application for reargument will be granted and the judgment of the Court modified the absence of such a request and an opportunity to submit a reply in response thereto.

In short, the Pennsylvania procedure provides the opportunity to file a petition for reargument and the opportunity for the appellate court to determine whether it will even entertain the consideration of such a petition. It is only after the preliminary determination by the Court

that they will entertain a motion for reargument that the finality of the previous decision of the Court is brought in question. Therefore, under Pennsylvania law that judgment remains unaffected, with respect to its finality, by the mere filing of a petition for reargument with an appellate court.

In this instance the Appellants received a final judgment from the Pennsylvania Supreme Court on July 6, 1979, Subsequent thereto they filed a petition for reargument with the Pennsylvania Supreme Court and received from the Prothonotary of the Supreme Court a letter dated August 28, 1979, informing them that, on August 22, 1979, the Pennsylvania Supreme Court had denied their petition. The Court did not formally accept for consideration the petition for reargument and the Appellees were never advised to file any response thereto. Clearly under Pennsylvania law the decision of the Supreme Court filed July 6, 1979 was, and remained, a final judgment. Since the Appellants have failed to file an appeal to this Court within 90 days of the rendering of the final decision of the Pennsylvania Supreme Court their appeal is untimely and consideration of the appeal by this Court should be refused.

2. *The questions upon which the decision of the case depends are so unsubstantial as not to need further argument.* To be valid a local zoning ordinance must have as its objectives the preservation or furtherance of the health, safety and general welfare of the community and the ordinance must be drawn to rationally promote its objectives. *County Board of Arlington v. Richards,* 434 U.S. 5 (1977). The question raised before, and adjudicated by, the Supreme Court of Pennsylvania was whether

the ordinance of London Grove Township had the required nexus to the health, safety and general welfare and whether it was drawn to rationally promote that nexus.

First it is important to focus on the health, safety and general welfare problems which arise with respect to sanitary landfills. The Appellants' witnesses, especially Dr. Schoenberger, testified at length about these problems. The problems include pollution of groundwater as a result of dumping chemical waste or of not providing adequate base; rodents and insects as a result of inadequate cover or lack of coverage; litter; erosion; danger from machine operation; noise pollution; methane gas; and a lack of financial responsibility. Clearly without control of these problems sanitary landfills would become such a danger to the health, safety and general welfare as to warrant their prohibition.

The record shows that these problems are in fact regulated by the Department of Environmental Resources of the Commonwealth of Pennsylvania. The Department has established guidelines for sanitary landfills and has established a permit and inspection procedure under the Pennsylvania Solid Waste Management Act, Pa. Stat. Ann. Tit. 35, Sections 6001-6017 (Purdon 1977). On paper, this program attacks most of the problems discussed above, although financial responsibility and litter control are not fully regulated. But full compliance with this program is necessary to prevent the hazards to health and safety discussed above.

The Appellants' witnesses then testified that noncompliance and violation of the Department's regulations are a daily occurrence. Almost every inspection by the

Department evidences numerous violations of the regulations, even in sanitary landfills operating under Department permit. This occurs even though the operators of sanitary landfills often know ahead of time that an inspection will be made. In fact, some violations cannot be avoided in the normal course of sanitary landfill operations. Thus, while the regulations are important in controlling the detrimental effects of sanitary landfills, they leave at least two gaps: the constant violations and the unregulated problems.

Next it is important to understand the further problem posed by reliance upon the regulations. While they, in the abstract, provide control of sanitary landfills, they, in practice, lack effective enforcement. It is difficult, if not impossible, for the Department to effectively enforce its regulations. This conclusion was voiced by the Appellants' own expert, Dr. Schoenberger. In addition, the Appellants' witnesses from the Department testified as to the extensive legal procedures and the length of time necessary for injunctive relief or permit revocation. Some violations are still in existence three years after the violations have become known and after they have started to adversely affect the public health, safety and general welfare.

In light of this testimony presented by the Appellant, it was laudible, not unreasonable, that the Board of Supervisors of London Grove Township sought extra protection for its citizens against the problem of sanitary landfills and the inadequacy of present regulatory controls and enforcements. There was clearly the nexus between the use and the adverse impact on the health, safety and general welfare. As the testimony demonstrates the

problems which remain dealt with (1) unregulated or underregulated problems; (2) continuing violations; and (3) slow enforcement procedures. Clearly, regulations could be enacted for problem after problem as they come to light. And clearly, constant and more vigorous inspections by a larger staff of the Department could decrease violations of regulations. But it is doubtful that constitutional due process would permit much improvement in enforcement procedures.

In light of this, London Grove Township established a regulation which would rationally be expected to help meet all three problems. Its answer has been to make each sanitary landfill operator subject to local public pressure. As the Appellants' engineer testified municipal sanitary landfills are subject to pressure through the governmental system which is responsible for them. The local authority, the Southeastern Chester County Refuse Authority, has testified to examples of that responsiveness. Thus, in short, since the substantial dangerous problems of sanitary landfills are not, by experience and by admission of the Appellant, solvable by either normal regulation or normal legal process, London Grove Township has turned to the use of the political process to help solve its problems. Having established the nexus between the use and the health, safety and general welfare it is clear that the Township's ordinance has been drawn to rationally promote the objectives of its regulation. *County Board of Arlington v. Richards, supra.*

It is clear that the three justices of the Supreme Court of Pennsylvania who acted in support of affirmance of the decision of the Commonwealth Court of Pennsylvania applied the test and reasoning set forth in the *County Board of Arlington* case. As Mr. Justice Roberts stated:

> I would hold, therefore, as the Board, the Court of Common Pleas of Chester County and the Commonwealth Court, that the Township's concerns for public health manifested by its enforcement of sanitary regulations, and the continued operational stability of the Township's sanitary landfill operations is entirely reasonable. This governmental exercise of its police function simply cannot be judged so unrealistic as to make the zoning provisions unconstitutionally arbitrary.

For the foregoing reasons, Intervening Appellees ask that either the appeal be dismissed or the decision of the Courts below be affirmed.

Respectfully submitted,

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Filed: December 20, 1979

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of December, 1979, one copy of this brief was served by first class mail, postage prepaid, on the following attorneys:

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I further certify that all parties required to be served have been served.

ROBERT W. LENTZ
30 Darby Road
Paoli, Pennsylvania 19301
Attorney for Intervening Appellees

APPENDIX A

PENNSYLVANIA RULES OF APPELLATE PROCEDURE

Rules 2541-2547

APPLICATION FOR REARGUMENT

Rule 2541. Form of Papers; Number of Copies

All papers relating to applications for reargument shall be prepared in the manner prescribed by Rule 2171 (method of reproduction) through Rule 2174 (tables of contents and citations). Seven copies shall be filed with the original.

Note: This rule and the succeeding rules on reargument practice are patterned after the practice in Rules 1111 et seq. (petition for allowance of appeal).

Amended June 23, 1976, effective July 1, 1976.

Rule 2542. Time for Application for Reargument

An application for reargument shall be filed with the prothonotary within 14 days after entry of the judgment or other order involved.

Note: Former Supreme Court Rule 64, former Superior Court Rules 55 and 58 and former Commonwealth Court Rule 113A required the application for reargument to be filed within ten days of the en-

try of the order. Under Rule 105 (b) (enlargement of time) the time for seeking reargument may be enlarged by order, but no order of the Superior Court or of the Commonwealth Court, other than an actual grant of reargument meeting the requirements of Rule 1701 (b) (3) (authority of lower court or agency after appeal), will have the effect of postponing the finality of the order involved under Rule 1113 (time for petitioning for allowance of appeal).

It is important to note that unlike other provisions of these rules the mailing of an application for reargument does not toll the time for seeking reargument. Under this rule and Rule 121 (filing and service) the application for reargument must be received by the appellant prothonotary within the 14 day period.

Amended June 23, 1976, effective July 1, 1976; amended Dec. 11, 1978, effective Dec. 30, 1978.

Rule 2543. Considerations Governing Allowance of Reargument

Reargument before an appellate court is not a matter of right, but of sound judicial discretion, and reargument will be allowed only when there are compelling reasons therefor.

Note: The following, while neither controlling nor fully measuring the discretion of the court, indicate the character of the reasons which will be considered:

(1) Where the decision is by a panel of the court and it appears that the decision may be inconsistent with a decision of a different panel of the same court on the same subject.

(2) Where the court has overlooked or misapprehended a fact of record material to the outcome of the case.

(3) Where the court has overlooked or misapprehended (as by misquotation of text or misstatement of result) a controlling or directly relevant authority.

(4) Where a controlling or directly relevant authority relied upon by the court has been expressly reversed, modified, overruled or otherwise materially affected during the pendency of the matter sub judice, and no notice thereof was given to the court pursuant to Rule 2501 (b) (change in status of authorities).

Rule 2544. Contents of Application for Reargument

(a) General rule. The application for reargument need not be set forth in numbered paragraphs in the manner of a pleading, and shall contain the following (which shall insofar as practicable, be set forth in the order stated):

(1) A reference to the order in question or the portions thereof sought to be reargued, and the date of its entry in the appellate court. If the order is voluminous, it may, if more convenient, be appended to the application.

(2) A specification with particularity of the points of law or fact supposed to have been overlooked or misapprehended by the court.

(3) A concise statement of the reasons relied upon for allowance of reargument. See Rule 2543 (considerations governing allowance of reargument).

(4) There shall be appended to the application a copy of any opinions delivered relating to the order with respect to which reargument is sought, and, if reference thereto is necessary to ascertain the grounds of the application for reargument, slip opinions in related cases. If whatever is required by this paragraph to be appended to the application is voluminous, it may, if more convenient, be separately presented.

(b) No supporting brief. All contentions in support of an application for reargument shall be set forth in the body of the application as prescribed by Paragraph (a) (33) of this rule. No separate brief in support of an application for reargument will be received and the prothonotary of the appellate court will refuse to file any application for reargument to which is annexed or appended any supporting brief.

(c) Length. Except by permission of the court, an application for reargument shall not exceed ten pages of conventional typographical printing or 15 pages of any other process of duplicating or copying exclusive of pages containing table of contents, table of citations and any addendum containing opinions, etc., or any other similar supplementary matter provided for by this rule.

(d) Essential requisites of application. The failure of an applicant to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring reconsideration will be a sufficient reason for denying the application.

(e) Multiple applicants. Where permitted by Rule 512 (joint appeals) a single application for reargument may be filed.

Note: Former Supreme Court Rule 64, and former Superior Court Rule 113A permitted the applicant in effect to dump an undigested mass of material (i.e., briefs in and opinions of the court) in the lap of the court, with the burden on the individual judges and their law clerks to winnow the wheat from the chaff. This rule, which is patterned after Rule 1115 (content of petition for allowance of appeal), places the burden on the applicant to prepare a self-contained succinct and coherent presentation of the case and the reasons in support of allowance of reargument.

Amended Dec. 11, 1978, effective Dec. 30, 1978.

Rule 2545. Answer to Application

No answer in opposition or separate motion to strike an application for reargument will be received unless requested by the court. No application for reargument will be granted and the judgment of the court modified in the absence of such a request and an opportunity to submit a reply in response thereto.

Note: Patterned after U. S. Supreme Court Rule 58(3). Former Supreme Court Rule 64 and

former Commonwealth Court Rule 113A permitted an answer to a petition for reargument in all cases. See also Rule 1123 (reconsideration of denial of petition for allowance of appeal).

Amended Dec. 11, 1978, effective Dec. 30, 1978.

Rule 2546. Transmission of Papers to and Action by the Court

Upon receipt of the application for reargument, the application shall be distributed by the prothonotary to the court for its consideration. If an application for reargument is granted the court may restore the matter to the calendar for reargument, or if a reply to the application has been requested by the court, the court may make final disposition of the matter without further oral argument or may take such other action as may be deemed appropriate under the circumstances of the particular case. Reargument may be allowed limited to one or more of the issues presented in the application, in which case the order allowing the reargument shall specify the issue or issues which will be considered by the court.

Rule 2547. Subsequent and Untimely Applications

Second or subsequent applications for reargument, and applications for reargument which are out of time under these rules, will not be received.